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No. 90-1014

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

ROBERT E. LEE, et al.,
Petitioners,

v.

DANIEL WEISMAN, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICI CURIAE FOR THE STATES OF UTAH, IDAHO, NORTH DAKOTA, PENNSYLVANIA, AND WYOMING IN SUPPORT OF PETITIONERS' REQUEST FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

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INTEREST OF AMICI CURIAE

The State of Utah and the other states listed above, by and through their respective Attorneys General, appear on their own behalf, on behalf of their state boards of education, and on behalf of local school districts, political subdivisions of the state. Although this brief amici curiae highlights the State of Utah's current legal predicament, all amici curiae share the same interest in a clear pronouncement from the United States Supreme Court on the extent to which the Establishment Clause of the

First Amendment permits prayers at public school graduation ceremonies. All amici curiae operate public school systems. All have been or are actively engaged in litigation involving prayer at public school ceremonies, or are under a serious threat of such litigation.[1] Amici curiae take no position here on the merits of the substantive issue, i.e., the extent to which prayer is constitutionally permissible at public school graduation ceremonies. This brief amici curiae is submitted pursuant to Rule 37.5 solely to encourage this Court to grant certiorari and decide the important questions presented by petitioners.

The State of Utah is charged with the general supervision and maintenance of a public school system open to all children of the state. That duty arises from the Federal Enabling Act, 28 Stat. 107 (1894), and Article III of the Utah Constitution. In Utah, the public school system is comprised of the State Board of Education, granted general control and supervisory responsibility by Article X of the Utah Constitution and by Utah Code Ann. § 53A-1-401 (1989), and forty elected, tax-funded local boards of education, granted broad authority by Utah Code Ann. § 53A-3-402 (1989) to control and manage practices in local public schools, including the content of

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[1]Amici curiae are in the process of preparing a complete compilation of pending litigation that will be provided to the Court if certiorari is granted.

graduation and other public school ceremonies.

Since statehood in 1896, the tradition followed by most local boards of education in Utah has been to allow prayers at public school graduation exercises. Over the last few years, however, this practice has been challenged by individuals and groups as a religious practice that endorses religion in contravention of the Establishment Clause. More recently, the State of Utah, the State Board of Education, and several local school districts have become embroiled in lawsuits involving the same First Amendment claims raised in *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990).

In *Albright v. Board of Educ. of Granite School Dist.*, Civ. No. 90-C-639G (D. Utah, filed July 30, 1990), plaintiffs contend that local school districts and school officials have violated the Establishment Clause by permitting prayers to be offered by lay individuals at various public junior and senior high school graduation ceremonies. Conversely, in *Vaughn v. Washington County School Dist.*, Civ. No. 90-C-430W (D. Utah, filed May 15, 1990), recently settled by the parties, plaintiff sought to force the local school district to permit prayers at high school commencement.

An action by other Utah taxpayers, *Campbell v. Utah State School Bd.*, Civ.

No. 900503333 (Fifth Dist. Ct., filed October 24, 1990), still pending in state court, seeks damages and a declaratory judgment that local school boards are not prohibited by law from adopting policies permitting prayers at public meetings and public school ceremonies. This suit results from the State Board of Education's refusal to consider an administrative rulemaking petition seeking its precise delineation of the limits of prayer in public schools across the state.

As these cases demonstrate, Utah public school officials, like their colleagues nationwide, are subject to competing pressures from members of the public with diametrically opposed positions. Some expect and insist upon prayers as a traditional part of school graduation exercises. Others contend that any prayer in a public school context, even as part of a ceremony and not a classroom activity, constitutes an impermissible advancement of religion by the state.

State agencies and school officials are trapped in the middle of this dispute, not wishing to tread on First Amendment rights, but finding insufficient guidance in the conflicting and confusing case law. As more fully discussed in the argument section of this brief, the Courts of Appeals for the First and Sixth Circuits have reached opposite conclusions about the constitutionality of invocations and benedictions as part of public school

commencement exercises. The six members of those circuit panels are themselves in sharp disagreement about the constitutional analysis applicable in the public school ceremonial context and about whether any form of prayer in that setting--however redacted to eliminate denominational associations or references to a deity--can survive when scrutinized under the appropriate First Amendment test. These incompatible views of the commands of the First Amendment have also been adopted in conflicting decisions of state courts and federal district courts. Each view claims to find its support in the same United States Supreme Court precedents.

Given the current state of confusion in the law on this very volatile and divisive topic, definitive clarification is of urgent interest to the State of Utah and other amici curiae. Without a decisive resolution of the difficult First Amendment issues raised by prayers at public school ceremonies, the school systems and communities in our states will continue to be rent by disagreement over what the constitution allows or prohibits, and financially hard-pressed states will have to expend substantial sums relitigating the same issues through the state and federal court systems. Furthermore, local school districts will be forced to spend considerable amounts of time, energy, and scarce taxpayers' dollars defending themselves on all fronts, regardless of which position they take in the public school graduation prayer conflict.

The interests of the amici curiae will be well served by an exercise of the Court's discretion to grant certiorari in the instant case. The petition presents a straightforward and timely opportunity for the Court to consider the important Establishment Clause questions raised by school graduation prayers and to provide clear directions to state and local school officials about whether, and if so, how, to allow prayer at graduation and other public school ceremonies.

SUMMARY OF ARGUMENT

Resolution of the issue of the constitutionality of prayer at public school ceremonies such as graduation and commencement exercises is of great importance to the amici curiae states and their state and local school boards. The strong historical tradition of prayer at public ceremonial events creates an urgent need for clarification of conflicting court decisions. At this point, the decisions and supporting rationales are so divergent that there is no uniform standard upon which school districts and boards of education can confidently make choices, or upon which the states can offer counsel to their agencies and political subdivisions. Thus, the need for a clear determination is paramount. A decision by this Court would lay this divisive controversy to rest and prevent further diversion of resources into litigation and away from appropriate academic matters.

ARGUMENT

I. THE DECISION AFFIRMED BY THE FIRST CIRCUIT COURT OF APPEALS DIRECTLY CONFLICTS WITH A DECISION OF THE SIXTH CIRCUIT, AS WELL AS THOSE OF NUMEROUS LOWER FEDERAL AND STATE COURTS.

The divergence between the constitutional analysis used by the district court in this case, adopted in full by the First Circuit Court of Appeals, and that used in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), is fully set forth at pages 4-6 and 14-18 of the Petition for Certiorari already filed with the Court, and will only be summarized here by amici curiae. Simply put, the courts have reached opposite conclusions on whether the constitutionality of prayer at a public school graduation ceremony must be assessed using the historical analysis employed by the Court in *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding nonsectarian prayers opening state legislative sessions because of the long history of the practice), or the three-prong Establishment Clause test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In *Stein*, the Court of Appeals reversed a Michigan federal district court decision which had allowed graduation prayer. The appellate court analyzed the First Amendment issue under

a concept of "equal liberty of conscience" drawn from *Marsh*, 463 U.S. at 786. Finding itself at the boundary between public tradition and liberty of individual conscience, the Sixth Circuit relied on *Marsh* and concluded that secularized prayer at graduation ceremonies has the legitimate secular purpose of providing solemnity and dignity to the occasion. *Stein*, 822 F.2d at 1409. As to the specific prayers in question, the court found the language employed to be that of Christian theology and therefore suspect as placing government's seal of approval on one religious view. Thus, the prayers did not pass the *Marsh* test. *Id.* at 1410.

In contrast, the district court in the instant case rejected *Marsh* as inapplicable in the public school context. Instead, the court applied only the *Lemon* test, concluding that the nondenominational invocations and benedictions failed the second prong of the *Lemon* test. By invoking a deity, the court reasoned, the prayers at the public school commencement exercise had the primary effect of impermissibly advancing religion "by creating an identification of school with a deity." *Weisman*, 728 F. Supp. at 72.

This conflict over which test to use, as well as over whether mention of a deity renders a nondenominational prayer impermissible in the graduation ceremony context, is also evident in numerous state appellate court and federal district court decisions. Thus, for

example, graduation ceremony prayer was upheld in *Sands v. Morongo Unified School Dist.*, 214 Cal. App. 3d 45, 262 Cal. Rptr. 452, *review granted*, 264 Cal. Rptr. 683, 782 P.2d 1139 (1989); *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974); *Wood v. Mt. Lebanon Township School Dist.*, 342 F. Supp. 1293 (W.D. Pa. 1972); and *Wiest v. Mt. Lebanon Township School Dist.*, 457 Pa. 166, 320 A.2d 362, *cert. denied*, 419 U.S. 967 (1974). However, similar invocations and benedictions at graduation ceremonies were invalidated in *Lundberg v. West Monona Community School Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Graham v. Central Community School Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985); *Kay v. David Douglas School Dist.*, 79 Or. App. 384, 719 P.2d 875 (1986), *rev'd on other grounds*, 303 Or. 574, 738 P.2d 1389 (1987), *cert. denied*, 484 U.S. 1032 (1988); and *Bennett v. Livermore Unified School Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987).

Where prayers at graduation have been approved, the courts have relied on a "secular" or "nonsectarian" rationale. Where prayers are disapproved, the rationale often does not question prayer *per se*, but rather focuses on the offending language or words used. Even removing the offending words, such as deity names, may be insufficient if the content of the edited prayer suggests that a deity may be even *thought* of. *See e.g.*, *DeSpain v. DeKalb County Community School Dist.*, 384 F.2d 836 (7th Cir. 1967) (required recitation of verse not

expressly mentioning deity held unconstitutional as classroom prayer), *cert. denied*, 390 U.S. 906 (1968).

The foregoing cases demonstrate the disarray created by courts' attempts to sort out the precise words of prayer which can constitutionally be used at public school ceremonies. If the courts cannot be clear, it is certain that school officials and their advisers will be confused, too. Not only do the conflicting decisions rely on different Establishment Clause tests, they reach different conclusions concerning what precise words of prayer are permissible. This situation results in unclear guidance, if any, for those officials responsible for school operations.

II. THE QUESTION OF PRAYER AT GRADUATION AND OTHER PUBLIC SCHOOL CEREMONIES IS ONE OF NATIONAL SIGNIFICANCE

Religion and belief in a deity generally have been an integral part of this nation's history from its beginning, including a recognition "that all men ... are endowed by their Creator with certain unalienable Rights" in the Declaration of Independence. This Court itself has characterized the United States as a religious nation and people, citing references to God in national historical documents and almost every state constitution. *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 514 (1892). Indeed, references to a deity are part of many national observances and patriotic customs,

including our pledge of allegiance and national motto. 36 U.S.C. §§ 172, 186 (1988) As noted above, this Court has recognized public prayer at a session of a state legislature as a valid tradition. *Marsh v. Chambers*, 463 U.S. 783 (1983).

The use of invocations and other forms of prayer at other public ceremonies, including school commencement exercises, is also a long-standing tradition in this country. Yet, in the area of public schools, "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). In *Engel v. Vitale*, 370 U.S. 421 (1962), this Court invalidated a state program requiring daily recitation of an officially composed prayer. In *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), the Court struck down the daily recitation of the Lord's Prayer with scripture reading. The following year, the Court again invalidated the regular recitation of the Lord's Prayer by reversing the Florida State Supreme Court, which twice had allowed the practice. *Chamberlain v. Dade County Bd. of Public Instruction*, 377 U.S. 402 (1964). Twenty-one years later, the Court held that a statute authorizing a period of silence for meditation or voluntary prayer and allowing teachers to lead a prescribed prayer, authorized by the state legislature with the sole purpose of returning prayer to public school classrooms, violated the Establishment Clause. *Wallace v.*

Jaffree, 472 U.S. 38 (1985). While the foregoing decisions characterized the prayer at issue as "voluntary" by state law, each case dealt with regular prescribed or set prayer with teachers in the classroom.

Most recently, however, the Court has validated prayer in the context of a prayer club meeting on a high school campus under the Equal Access Act. *Board of Educ. of Westside Community Schools v. Mergens*, 495 U.S. ___, 110 S.Ct. 2356 (1990). In *Mergens*, Justice O'Connor, writing for the majority, focused on the compulsory nature of attendance, the maturity of students, and whether allowing such a club on campus is an endorsement of religion, and concluded that the Act did not transgress the Establishment Clause by allowing a religious student group equal access to school space on the same basis as other groups. *Mergens* suggests that prayer at a school ceremony outside the classroom context may be constitutionally valid.

In light of long-standing national, state, and local traditions employing prayers at ceremonial gatherings, the citizens of this nation need to know if the use of prayer, constitutionally permissible at other public ceremonies, is permissible in the context of a public school commencement ceremony.

CONCLUSION

The school graduation prayer question potentially affects every state, every board of education, and every school district in the nation. What we have is a hodgepodge of tests, rationales, and results. What we need is either a uniform standard for constitutionality upon which local officials may exercise their discretion to have or not have prayer at graduation exercises, or a clear message that prayer at graduation, despite its long tradition, is forbidden as an unconstitutional practice that endorses religion.

For these reasons, amici curiae urge the Court to grant certiorari in this case and answer the questions presented.

Respectfully Submitted,

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